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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

WESLEY SCOTT WHITMORE,

Defendant/Appellant.

Case No. 20020471-CA

BRIEF OF APPELLANT

**APPEAL FROM JUDGMENT, SENTENCE, AND ORDER FOR COMMITMENT
RESULTING FROM AN ORDER DENYING A MOTION TO WITHDRAW
GUILTY PLEA OR TO DECLARE A MISPLEA, IN THE FOURTH JUDICIAL
DISTRICT COURT IN AND FOR UTAH COUNTY, UTAH, THE HONORABLE
RAY M. HARDING PRESIDING.**

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IN THE UTAH COURT OF APPEALS		
STATE OF UTAH,	Plaintiff/Appellee,	Case No. 20020471-CA
vs.		
WESLEY SCOTT WHITMORE,		
Defendant/Appellant.		
BRIEF OF APPELLANT		

JURISDICTION

Appellant, WESLEY SCOTT WHITMORE (“Whitmore”), appeals the district court’s Orders dated August 14, 2001, February 25, 2002, and April 9, 2002, denying his motion to withdraw guilty pleas or to declare a misplea, and the resulting Judgment, Sentence, and order for Commitment dated May 14, 2002. This Court has appellate jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(d).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

ISSUE 1: Did the trial court err when it denied Whitmore’s Motion to Withdraw Guilty Pleas despite the undisputed fact that Whitmore was denied his right to counsel, as provided by the Sixth Amendment to the Constitution of the United States, at such a critical stage in the proceedings?

STANDARD OF REVIEW: The trial court's denial of a motion to withdraw guilty pleas is reviewed under an abuse of discretion standard, "incorporating the clearly erroneous standard for the trial court's findings of fact made in conjunction with that decision." State v. Norris, 57 P.3d 238, 240 (Utah Ct. App. 2002) (quoting State v. Benvenuto, 983 P.2d 556 (Utah 1999)).

ISSUE 2: Did the trial court err when it denied Whitmore's Motion to Declare a Misplea despite the established fact that Whitmore's prior counsel rendered ineffective assistance when he advised Whitmore that mistake as to an alleged victim's age was no defense and therefore he should accept the State's plea offer?

STANDARD OF REVIEW: A trial court's denial of a motion to declare a misplea appears to be reviewable under an abuse of discretion standard. State v. Kay, 717 P.2d 1294, 1305 (Utah 1986).

STATEMENT OF THE CASE

This case is an appeal from the judgment, sentence, and order of commitment stemming from the trial court's denials of Whitmore's motions to withdraw his guilty pleas and a motion to declare a misplea, all of which motions were grounded upon prior counsel's ineffective assistance. On June 2, 2000, Defendant, Wesley Scott Whitmore, was charged by Information with two counts of Unlawful Sexual Conduct with a 16 or 17 Year Old, both third degree felonies. On October 30, 2000, based upon the erroneous advice of counsel, Richard Gale ("Mr. Gale"), Mr. Whitmore pleaded guilty to the

Amended Information, two counts of Attempted Unlawful Sexual Conduct with a 16 or 17 year old, both class A misdemeanors.

More than 30 days later and upon realizing that he incorrectly advised Whitmore at the time of entry of plea, Mr. Gale filed a Motion to Arrest Judgment and a Motion to Withdraw Guilty Plea on March 7, 2001, on Whitmore's behalf (R. 41, 45). Mr. Gale then withdrew because of the conflict created by his admitted ineffective assistance and current counsel was appointed to represent Whitmore (R. 51). On June 14, 2001, in a reply memorandum to the State's opposition, Whitmore further requested the trial court to declare a misplea in the event that the trial court determined it was without jurisdiction to consider Whitmore's motion to withdraw his pleas based upon the then misunderstood 30-day filing requirement¹ (R. 66).

Oral arguments on the motion were held on June 21, 2001. At that time, current counsel proffered Whitmore's testimony that although Whitmore believed the alleged victim was over the age of 18, because Mr. Gale incorrectly advised Whitmore that mistake as to the alleged victim's age was no defense to the charges, Whitmore accepted the State's plea offer. It was also proffered that but for Mr. Gale's incorrect advice, Whitmore would not have accepted the State's offer but would have proceeded to trial (R. 145, p. 4) (Transcript of Oral Arguments). Whitmore also provided the trial court with

¹UTAH CODE ANN. § 77-13-6 (2)(b) provides that a motion to withdraw a guilty plea must be made within 30 days after the entry of plea.

Mr. Gale's affidavit wherein it was established that Mr. Gale provided constitutionally ineffective assistance at entry of plea (R. 71) (Affidavit of Mr. Gale, also attached as **Addendum A**). This fact has never been disputed, and the trial court accepted Whitmore's proffer and Mr. Gale's affidavit with no objection from the State.

In its Ruling dated August 14, 2001, the trial court denied Whitmore's Motion to Arrest Judgment and Withdraw Guilty Plea on the ground that Whitmore's motion was untimely under UTAH CODE ANN. § 77-13-6 (2) (b) because it was filed more than 30 days after entry of plea. The trial court incorrectly concluded that it was without jurisdiction to consider the motion. The trial court also stated that "'Ineffective Assistance of Counsel' is not implicated in rule 11 and it has a separate remedy" (R. 79, p.3). Further, despite Whitmore's proffered testimony on the record, the trial court erroneously stated, "There is no affidavit from defendant, or testimony at hearing why he entered his pleas to the reduced charges or why he wishes to withdraw his pleas" (*Id.* p. 4). This statement failed to account for Whitmore's proffered testimony during oral arguments and the trial court's acceptance of that testimony (R. 148, p. 4).

In denying Whitmore's motion to declare a misplea, the trial court concluded that there was no plain error because the "failure of counsel to notify a defendant of the possible defenses to his or her charges is not something that would be 'obvious to the trial court'" (*Id.* p. 5) (emphasis in original). The trial court also determined that there was no manifest necessity to grant the motion to declare a misplea.

Whitmore filed a Motion to Reconsider Motion to Withdraw Guilty Plea on September 13, 2001, based upon State v. Ostler, 31 P.3d 528 (Utah 2001), wherein the Utah Supreme Court clarified that the 30-day filing requirement provided in UTAH CODE ANN. § 77-13-6(2)(b) did not begin to run until after sentencing. Consequently, Whitmore's motion to withdraw his guilty pleas had been filed timely and the trial court had jurisdiction (R. 91). In its February 25, 2002, Ruling denying that motion to reconsider, the trial court determined that despite the admissions of Mr. Gale on the record that he provided ineffective assistance at the entry of plea, Whitmore had "failed to meet his burden of proof" because he had not provided a videotape or transcript of the plea colloquy (R. 111, p. 3). Despite Mr. Gale's affidavit and Whitmore's proffered testimony on the record establishing counsel's ineffectiveness, the trial court stated, "It is the position of this Court that there may exist a separate, stand alone remedy for 'ineffective assistance of counsel' and an 'ineffective assistance of counsel' argument is is not automatically implicated. Whether it is implicated or not may depend upon the record" (R. 111, p. 2) (emphasis in original).

On March 29, 2002, Whitmore filed a Motion to Reconsider the Court's Ruling on Defendant's Motion to Reconsider Defendant's Motion to Withdraw Guilty Plea, and included the videotape of the plea colloquy with that motion (R. 118), although Whitmore argued that the contents of the videotape were not necessary in light of the fact that Mr. Gale's ineffective assistance had already been established by his affidavit and Whitmore's

proffer. And as the trial court had previously conceded, “failure of counsel to notify a defendant of the possible defenses to his or her charges is not something that would be ‘obvious to the trial court’” (R. 79, p. 5) (emphasis in original). Nonetheless, on April 9, 2002, the trial court again denied Whitmore’s motion on the grounds that he had “failed to marshal sufficient evidence in the case and he has failed to meet his burden of proof” (R. 124, p. 1).

Whitmore was then sentenced on May 14, 2002, which sentence included an order for commitment to the Utah County Jail and 24 months probation. To the best of counsel’s knowledge, Whitmore has completed his commitment in this matter and is not currently incarcerated.

RELEVANT FACTS

While investigating a report of possible illegal drug activity on or about May 21, 2000, officer Michael Turner of the Provo City Police Department made contact with Emily Stone (“Stone”), the alleged victim in this case.² According to the police report, Ms. Stone was an individual with whom Officer Turner had contact on several prior occasions. During the drug investigation, Ms. Stone allegedly told Officer Turner of a sexual encounter with Whitmore that had occurred over 6 weeks previously while they were getting prepared to travel together to Wendover.

²These preliminary facts are contained in the police report but are not part of the record. They are provided here to place the events in context.

On June 2, 2000, and as a result of Ms. Stone's allegations, Whitmore was charged by Information with two counts of Unlawful Sexual Conduct with a 16 or 17 Year Old, both third degree felonies (R. 7). When Whitmore explained to his attorney, Mr. Gale, that Ms. Stone had represented in the presence of various witnesses that she was older than 18 years of age, Mr. Gale advised Whitmore that if Whitmore's mistake as to Ms. Stone's age was a valid defense to the charges, he would recommend proceeding to trial. Mr. Gale then erroneously explained that Whitmore's mistake as to the alleged victim's age was no defense and therefore, Whitmore should accept the State's plea offer (R. 71). Based upon this incorrect legal advice, Whitmore plead guilty to the Amended Information, 2 counts of Attempted Unlawful Sexual Conduct with a 16 or 17 Year Old, both class A misdemeanors.

On or about January 6, 2001, Mr. Gale learned that mistake as to the age of the victim was in fact a valid defense to the charges when he read State v. Martinez, 14 P.3d 114, 119 (Utah 2000) (explaining that mistake as to a victim's age is a valid defense to the charge of unlawful sexual conduct with a 16 or 17 year old). Mr. Gale stated in his subsequently filed affidavit that he "wrongly advised Whitmore regarding his potential defenses prior to him entering his plea of guilty . . . I do not believe that Whitmore had the benefit of correct legal advice or that his plea was entered knowingly and voluntarily" (R. 71, p. 3).

SUMMARY OF ARGUMENT

Point I. The trial court abused its discretion when it denied Whitmore's motions to withdraw his guilty pleas; and the trial court's finding that Whitmore failed to meet his burden of proof was clearly erroneous. That Whitmore was incorrectly advised by his attorney and that he relied on that incorrect advice in accepting the State's plea offer is an undisputed matter of record. Whitmore was entitled to but denied his constitutional right to counsel at a critical stage in the proceedings. The State did not argue, nor did the trial court find that prior counsel rendered constitutionally effective assistance, or that Whitmore entered his pleas knowingly and voluntarily. Such undisputed deprivation of a constitutional right constitutes sufficient good cause for the trial court to allow Whitmore to withdraw his pleas as a matter of law.

Point II. Had the trial court lacked jurisdiction to consider Whitmore's motion to withdraw his pleas, which it did not, it should have granted Whitmore's motion to declare a misplea. The ineffective assistance of Whitmore's counsel at entry of plea constituted manifest necessity and obvious reversible error for purposes of declaring a misplea, and there was no showing of undue prejudice to Whitmore.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WHITMORE'S MOTIONS TO WITHDRAW HIS PLEAS.

"The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the

proceeding.” Strickland v. Washington, 466 U.S. 668, 691 (1984). A showing that counsel was ignorant of the facts or the law constitutes ineffectiveness. State v. McNichol, 554 P.2d 203 (Utah 1976). Further, a defendant must be provided with counsel at every important stage or hearing of the proceedings against him, meaning at any hearing that may result in confinement. State v. Eichler, 483 P.2d 887 (Utah 1991).

Rule 11 of the Utah Rules of Criminal Procedure provides in pertinent part that a court “may not accept the plea until the court has found . . . if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel.” A defendant who chooses to plead guilty must enter such plea voluntarily, knowingly, and with a full understanding of his rights and the consequences of entering a plea. See, State v. Benvenuto, 983 P.2d 556, 558 (Utah 1999) (explaining that Rule 11 must be strictly complied with such that a defendant’s guilty plea is knowing and voluntary and “the defendant knowingly waived his or her constitutional rights and understood the elements of the crime”) (citing State v. Gibbons, 740 P.2d 993, 995 (Utah 1987)).

If the requirements of Rule 11 are not strictly complied with and the trial court then “subsequently denies the withdrawal of the plea, the trial court has exceeded its permitted range of discretion as a matter of law.” State v. Mills, 898 P.2d 819, 821 (Utah Ct. App. 1995). The primary purpose of Rule 11 “is to insure that when a defendant enters a guilty plea and thereby waives important constitutional rights, such as the right to

a jury trial, he or she acts freely and voluntarily with full knowledge of the consequences of the plea.” State v. Kay, 717 P.2d 1294, 1299 (Utah 1986). To that end, Rule 11 requires that a defendant “shall be represented by counsel before a plea is taken,” unless the defendant waives that right. Id. “Failure to inform a defendant of the nature and elements of the offense is fatal to a guilty plea conviction.” Id. (quoting State v. Pharris, 798 P.2d 772, 777 (Utah Ct. App. 1992)).

Because entry of a guilty plea could (and in fact did) result in confinement, Whitmore was entitled to counsel. And as the trial court noted, whether Whitmore had effective assistance of counsel at entry of plea was not obvious from the plea colloquy. Ineffective assistance is obvious, however, from Mr. Gale’s affidavit, and was further made manifest in Whitmore’s proffered testimony. It is compelling that the trial court never made a finding of effective assistance, nor did it or assert that Whitmore entered his pleas knowingly and voluntarily. Rather, the trial court acknowledged prior counsel’s ineffective assistance and advised Whitmore that he had a separate remedy, presumably civil, to address the deprivation of his constitutional rights. Counsel is aware of no legal precedent that sanctions a court’s deprivation of a defendant’s constitutional rights during a criminal proceeding on the basis that a civil remedy may be available on some future day, after the defendant has been deprived of his liberty and due process of law. The trial court ruled in effect that although Whitmore was admittedly deprived of an important constitutional right, he could only seek redress via civil litigation. This position is

without precedent and undermines basic constitutional safeguards during criminal proceedings. Whether Whitmore also has a civil cause of action is irrelevant.

In summary, there is no dispute that Whitmore was entitled to effective assistance of counsel at entry of plea. Further, counsel's ineffectiveness and that Whitmore's plea was entered unknowingly and involuntarily are undisputed facts on the record. Therefore, the trial court abused its discretion as a matter of law in denying Whitmore's motions to withdraw his pleas.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WHITMORE'S MOTION TO DECLARE A MISPLEA.

A court can rescind its acceptance of a guilty plea and "declare a mis[plea] . . . when an error occurs which will obviously compel reversal if the case is appealed, thus making further proceedings futile." State v. Moss, 921 P.2d 1021, 1023 (Utah 1996) (quoting State v. Kay, 717 P.2d at 1304-5). A court may rescind its acceptance of a guilty plea at any time prior to sentencing, even several months after the fact, provided doing so will not cause undue prejudice to the defendant and there is "manifest necessity." See, State v. Horrocks, 17 P.3d 1145, 1149 (Utah Ct. App. 2001) (explaining that the standard for rescinding acceptance of a guilty plea is the same as for declaring a mistrial and permits a trial court to declare a misplea at any time prior to sentencing). Circumstances that would justify rescinding acceptance of a plea include "when accepting the plea is the result of an obvious reversible error." Id.

A defendant will not suffer undue prejudice as the result of a declaration of misplea absent a showing that he “has taken some affirmative action which would materially and substantially affect the outcome of [trial].” State v. Moss, 921 P.2d at 1027. A trial court may grant a misplea if doing so “restored both parties to their original, pre-plea positions.” Id. The key inquiry is whether the defendant “made an admissible confession or made other incriminating statements in reliance on his plea which would have substantially affected his [trial]”. Id. It is not, however, appropriate for a trial court to speculate about remote possibilities or weigh evidence that is not in the record and may not even be admissible when making a determination of whether a defendant would be unduly prejudiced, as the trial court did in this case.

The act of setting a plea aside or of declaring a misplea is distinct from a trial court’s granting of a motion to withdraw a guilty plea. A trial court may rescind its acceptance of a guilty plea at any time prior to sentencing based upon an obvious reversible error. Assuredly, a defendant should not be subjected to a more stringent standard than the State when there is an obvious error that makes his plea invalid, particularly when a court will so find in further wasteful proceedings. It is appropriate for a trial court to rescind its acceptance of a guilty plea when there is an obvious reversible error that will make further proceedings futile and merely prolong and delay the judicial process, as is the case here.

In this case, it is undisputed that Whitmore was denied his Sixth Amendment

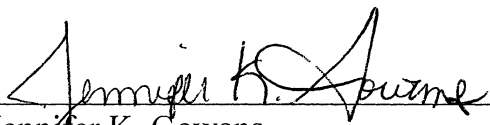
right to counsel during entry of plea. With Mr. Gale's affidavit attached hereto as **Addendum A** becoming part of the record, the error became obvious and neither the trial court nor the State argued otherwise. Moreover, Mr. Gale filed the initial motion to withdraw Whitmore's pleas based upon his own admitted ineffective assistance. Further, there is no question that Whitmore was entitled as a matter of law to be represented by counsel at entry of plea. He never waived that right. The undisputed fact that he was denied that right certainly constitutes manifest necessity for purposes of declaring a misplea. Moreover, further proceedings were futile because it was established that Whitmore did not enter his pleas knowingly and voluntarily, and therefore, his pleas were not valid. The trial court's speculative discussion in its August 2001 Ruling about hypothetical and possible prejudice to Whitmore resulting from a misplea was inappropriate. The trial court made no finding that Whitmore made an admissible confession or other incriminating statements in reliance on his plea which would substantially affect his trial, which is the appropriate standard.

Accordingly, the trial court erred when it denied Whitmore's motion to declare a misplea.

CONCLUSION

Based upon the foregoing facts and law, Appellant, Wesley Scott Whitmore, respectfully requests this Court to vacate his convictions in this case and to find that the trial court abused its discretion when it denied Whitmore's motions to withdraw his guilty pleas and his motion to declare a misplea.

Respectfully submitted this 13th day of January, 2003.


Jennifer K. Gowans
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on this 12th day of January, 2003, I caused to be mailed by United States mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLANT** to the following:

BRETT J. DELPORTO
Assistant Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
PO Box 140854
Salt Lake City, Utah 84114-0854

A handwritten signature in black ink, appearing to read "Jennifer Howard", is written over a horizontal line.

ADDENDA

ADDENDUM A: Affidavit of Richard Gale

ADDENDUM A

JENNIFER GOWANS
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COPY

IN THE FOURTH JUDICIAL DISTRICT COURT
STATE OF UTAH, UTAH COUNTY

STATE OF UTAH, Plaintiff, vs. WESLEY WHITMORE, Defendant.	AFFIDAVIT Case No. 001402276 Judge Lynn W. Davis
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County of Utah)

: ss.

State of Utah)

COMES NOW, Richard P. Gale, who, upon being duly sworn, deposes and says:

1. My name is Richard P. Gale. My date of birth is April 29, 1968. I am an attorney licensed to practice law in the State of Utah.
2. I am presently employed by the Utah County Public Defender's Association and was so employed in June of the year 2000.¹
3. In early June of 2000 I was assigned a client by the name of Wesley Whitmore. Whitmore was charged with two counts of Unlawful Sexual conduct with a 16 or 17 year old, a Third Degree Felony. Upon reviewing the police report I discovered that Whitmore had admitted to having sexual relations with a 17 year old female.

4. On August 28, 2000 I met with Whitmore at the Fourth District Court to discuss the case. Whitmore told me that he believed that the victim was over the age of 18 due to her appearance and behavior and that at the time he had sexual intercourse with her he believed the victim to be a consenting adult.

5. I told Whitmore that his mistake as to the victim's age was not a defense to this crime.

6. On October 30, 2000, Whitmore and I attended a Preliminary Hearing on his case in the Fourth District Court in front of Judge Lynn W. Davis. At the Preliminary Hearing the state offered to reduce the charges to Class A misdemeanors if Whitmore would plead guilty to the charges rather than proceed to trial.

7. After considering the plea offer made by the state I advised Whitmore that he should plead guilty. I told Whitmore *if* his mistake as to the age of the victim *was* a defense I believed that he would prevail at trial. I then told Whitmore *because* his mistake as to the victim's age was *not* a defense he would likely be convicted of the felony offenses at trial.

8. After considering my advice Whitmore waived his right to jury trial pled guilty to two counts of Attempted Unlawful Sexual Conduct with a 16 or 17 Year Old, class A misdemeanors.

9. On approximately January 6, 2001, while reading the case of State v. Martinez, 14 P.3d 114, 119 (Utah 2000), I learned that a defendant's mistake as to the age of a victim, though *not* a defense to the crimes of Rape of a Child and Unlawful Sexual Intercourse, *is however* a defense to the crime of Unlawful Sexual Conduct with a 16 or 17 Year Old.

10. I learned that State v. Martinez did not create new law, but simply highlighted the difference between crimes which deal with victims younger than 16 and crimes which deal with victims older than 16. I learned that section 76-2-304.5(2) of the Utah code does not preclude a

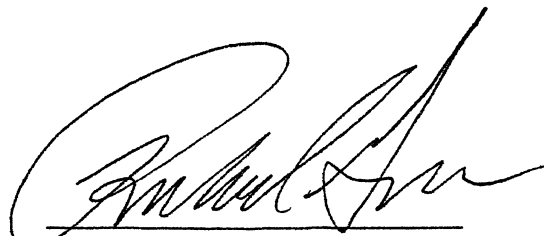
defendant's mistake as to age of the alleged victim from being claimed as a defense in the crime of Unlawful Sexual Conduct with a 16 or 17 Year Old with which Whitmore was charged.

11. On January 8, 2001, Whitmore and I attended his sentencing hearing in Fourth District Court. I informed Judge Lynn W. Davis that I had wrongly advised Whitmore regarding his possible defenses and that Whitmore would be moving to withdraw his plea of guilty to the misdemeanor offenses. Judge Davis continued the sentencing and set a day for a motion hearing.

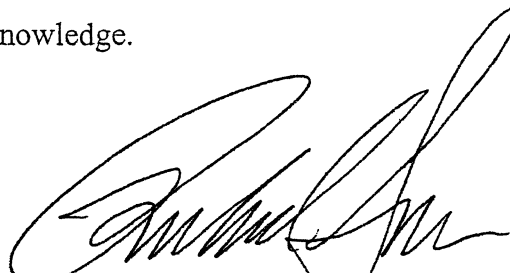
12. I subsequently conflicted the case to another attorney because Whitmore would be required to claim that I was ineffective and did not give him correct legal advice.

13. I do now affirm that I wrongly advised Whitmore regarding his potential defenses prior to him entering his plea of guilty to Attempted Unlawful Sexual Conduct With a 16 or 17 Year Old. I do not believe that Whitmore had the benefit of correct legal advice or that his plea was entered knowingly or intelligently.

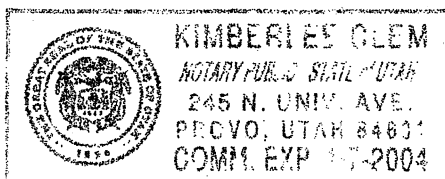
DATED 19 Day of June, 2001


Affiant

I hereby certify that on the 19 day of June, 2001 I read the above statement in its entirety and that it is true, complete, and accurate to the best of my knowledge.


Affiant

Subscribed and sworn to before me this 17 Day of June, 2001.



Kimberlee Glem
Notary Public